Supreme Court, U.S.
FILED

APR 18 2002

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(4)

No. 01-1303

IN THE

Supreme Court of the United States

DARWIN GREEN, ET AL.,

PETITIONERS,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., ET AL.,

RESPONDENTS.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONER

Respondents assert in their briefs in opposition to Petition for Writ of Certiorari that no conflict exists among the lower courts as to any issue of federal law. They attempt to persuade this Court that lower courts have adopted a uniform standard for involuntary exclusion of a party from attendance at trial, which does not offend the Constitution. They argue that the Maryland Court of Appeals has merely followed well-settled law.

Respondents ignore the fact that the Maryland Court of Appeals has implemented the most radical extension of any court's doctrine for involuntary exclusion of a party thus far. The Maryland Court of Appeals has decided that a mentally limited person is not entitled to a constitutional standard of review when eliminating the fundamental right of presence at a courtroom proceeding. The Maryland court holds that a mentally disabled individual who cannot comprehend proceedings or aid counsel is in fact, not a person, but instead a piece of evidence only due a court's discretionary review. The majority of the court ruled:

> [when a] plaintiff is unable to communicate or participate in the trial in any meaningful way [and when] the plaintiff would be unable even to comprehend the proceeding * * * the plaintiffs presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403. There was no abuse of discretion here. (Pet. App. 30a).

Respondents want this Court to overlook that Maryland's highest court has adopted the unimaginable standard that an individual can be so mentally disabled that he/she ceases to be a person entitled to fundamental guarantees of equal justice and due process which the Constitution was designed to protect. No other lower court has adopted such a standard.

Respondents also want this Court to ignore that judges on Maryland's highest court are in disagreement over this decision and that the opinion was not unanimous. Maryland's Chief Judge Bell wrote a lengthy, vigorous and in depth dissent highlighting the conflicting decisions throughout the Country. Pet. App. 49a-56a. Judge Rodowsky, one of Maryland's most senior judges during the Maryland appeal of this action, signed on to Judge Bell's dissent. These well-respected judges put forth a strong dissent, reaching the opposite opinion, that as a matter of *law* the trial court did not follow an appropriate federal constitutional standard.

Respondents endeavor to portray petitioners' position as advocating that parties have an absolute federal right to attend civil trials. Respondents then attempt to discredit this self-manufactured legal argument by showing that federal law is well settled on this issue. However, not once during the course of this litigation have petitioners argued an absolutist position. Petitioners have always recognized that parties may be excluded by voluntary waiver or to preserve decorum or to continue the orderly proceedings of the court. The very reason petitioners were not planning on bringing Darwin Green to court for the entire trial was to minimize any potential for disruption of the proceedings. Pet. App. 164a.

The trial court never made any finding that Darwin would be disruptive. Instead, the trial court found "that any viewing of the Plaintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff." Pet. App. 65a.

However, Chief Judge Bell points out: "the court determined only that the jury likely would be emotionally struck and sympathetic, rather than prejudiced in favor of the petitioners." Pet. App. 65a. Petitioners below and at present assert that this stereotypical presumption of prejudice, based only on the potential for jury sympathy, without any actual finding of jury bias utilizing the jury screening process infringes on Darwin's constitutional and statutory rights.

Tellingly, respondents fail to mention anywhere in their briefs the Oklahoma Supreme Court case of *Cary ex rel Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997). This case, published twelve years after *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), diverges from the holding of *Helminski*, discusses the application of the ADA to the right to be present at trial, and the need for *Helminski* and similar cases to be reexamined in light of the ADA. In his powerful dissent, Chief Judge Bell did not fail to thoughtfully outline the conflicting holdings of these two cases. He stated: "I am not persuaded by *Helminski* and those cases permitting the exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined to be prejudicial to the other party." Pet. App. 61a. Chief Judge Bell continued:

> I agree with the approach adopted by *Cary v. Oneok, supra.* * * * permitt[ing] the involuntary exclusion of a party "only in the case of extreme circumstances." * * * Accordingly, I would hold that, absent a voluntary waiver, a party may not be excluded from his or her trial except "to preserve decorum or to continue the orderly proceedings of the court." (Pet. App. 61a).

The *legal* standard annunciated in Maryland's majority opinion further conflicts with these two holdings because it forgoes any constitutional analysis. The decision treats a

mentally disabled individual as an inanimate object without any constitutional rights. The Maryland court, unlike any other court in the Nation, permits the trial court broad discretion to involuntarily exclude a party who cannot aid counsel or comprehend court proceedings without any constitutional safeguard in place.

Respondents' refusal to acknowledge the existence of a conflict is baffling. Law review articles have been written outlining the legal debate on this federal issue. Pet. 15, n.3. "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R. STERN *et al.*, SUPREME COURT PRACTICE 355 (7th ed. 1993). Where a different legal standard requiring a different ruling is announced in a "very similar case coming from another lower court" there is an undeniable conflict. W. REHNQUIST, THE SUPREME COURT 265 (1987).

In dissent, Maryland's Chief Judge Bell and Judge Rodowsky go out of their way to outline the conflicting *legal* standards regarding this question of federal constitutional law, which require different rulings. Moreover, not even the judges of Maryland's highest court are in agreement as to the appropriate legal standard. The Maryland court has put forth a lengthy majority opinion and a lengthy dissenting opinion, which demand different rulings. Conflict within Maryland's own court only confirms the need for this Court's review.

Respondents assert that petitioners invited the courts below to adopt an evidentiary standard rather than a constitutional standard. Opp. 5. It is true that Darwin's presence in court would serve the legitimate purpose of helping to establish the standard of care and causation elements of his case.[1] Darwin's counsel intended to let

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[1] Petitioners stated clearly in their response to respondents' motion in limine to exclude Darwin that allowing the jury to see Darwin's

Darwin "speak" through his condition in order to prove standard of care and causation elements of his case, just as respondents were allowed to testify in court. In this regard Darwin would have been assisting in the presentation of his case. Nonetheless, this was not the only reason Darwin had a right to be present. Petitioners have fully outlined all of the reasons a party's presence is necessary in court. Pet. 23-24.

More importantly, Darwin is much more than an exhibit. He is not an inanimate object. He is a human being with the same constitutional rights as the rest of us, and that includes the fundamental right to be present at his own trial. The inability of Darwin to communicate should determine neither his status nor his rights. The trial court's assumption that Darwin was being "presented" to the jury (Pet. App. 174a) shows the dehumanizing manner in which the court viewed him. Petitioners' desire to have Darwin present in court to show his injury to the jury to establish elements of his claim is worlds apart from the Maryland Court of Appeals espousing that a mentally limited person, that is not smart enough to understand his constitutional rights, need not be granted constitutional review because that individual is not a person, but solely an evidentiary object.

Respondents also argue that constitutional review does not apply to this case because it involves "acts of the judiciary." Opp. 24. Nonetheless, on many occasions this Court has applied constitutional review to acts of the judiciary. Constitutional equal protection of the laws is applicable with respect to court proceedings.[2] *See, e.g.,*

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condition was necessary to establish both standard of care and causation. Pet. App. 148a-150a.

[2] Respondents state in their brief that petitioners never raised the issue of equal protection. Opp. 24. This is not true. In petitioners' response to the motion in limine to exclude Darwin Green the first sentence asserts that exclusion is "frank, blatant discrimination against a disabled person." Pet. App. 144a. Petitioners went on to state in their response as follows:

Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628 (1991), *on remand*, 943 F.2d 551 (5th Cir. 1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Shelly v. Kraemer*, 334 U.S. 1 (1948) (teaching that courts themselves may not be vehicles of discrimination); *E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law -- that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy."). *See also Lee v. Habib*, 424 F.2d 891, 902 (D.C.Cir. 1970) ("Court procedures which of themselves invidiously discriminate * * * impair guarantees of equal justice which the Constitution was designed to protect.").

In *Batson v. Kentucky*, this Court stated: "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.*, 476 U.S. 79, 87 (1986). *See also Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628, 630 (1991), *on remand*, 943 F.2d 551 (5th Cir. 1991) (extending this reasoning to civil

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> Article 24 [of the Maryland Constitution] prohibits depravation of life, liberty, or property other than by judgment of his peers or by law of the land. This article embodies the United States constitutional concept of *equal protection*. (Pet. App. 147a) (emphasis added).

Petitioners' counsel also made the trial court aware at the pre-trial hearing that he cannot discriminate on the basis of a physical or mental disability. Pet. App. 166a. Moreover, by raising the ADA petitioners were also raising statutory equal protection. When enacting the ADA Congress utilized its Section Five Power (the enabling clause) of the Fourteenth Amendment to enforce the equal protection mandate of the Constitution.

proceedings, as well as criminal proceedings) ("we note that injury caused by the discrimination is made more severe because government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done"). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (holding that one of the reasons criminal trials are presumptively open to the public is because access to trials "fosters an appearance of fairness, thereby heightening public respect for the judicial process").

Respondents also argue that any error in excluding Darwin was harmless because it cannot be shown that the exclusion affected the outcome of the trial. Opp. 8. However, trial judges routinely commit errors during the course of trial that constitute reversible error. Some of these errors include not properly following federal constitutional law prohibiting acts of discrimination. Appellate courts often make findings that these violations of federal law constitute reversible error and remand the case. For instance, this Court has held that it constitutes reversible error for a trial court to allow attorneys to utilize discriminatory selection procedures when exercising preemptory challenges during the jury selection process. Such discriminatory practice violates the party to the action's Fourteenth Amendment, by compromising the representative quality of the jury. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Likewise, exclusion of Darwin from the courtroom was so grave a violation of his rights that the error cannot be considered harmless and prejudicial error must be presumed.

Respondents declare that the ADA is not applicable to this federal issue of law because the remedy section of the ADA does not contain a provision that allows for the reversal of a judgment of a lower court. Opp. 26-29. Traditionally, legislation under the Fourteenth Amendment has been framed to *prohibit* a discriminatory action. Section 12132 of Title II of the ADA (42 U.S.C. § 12132) is framed in such a manner. Sometimes, however, eliminating discrimination, which threatens principles of equality, requires affirmative relief, as well. Congress has the authority on these occasions to adopt prophylactic rules to deal with those situations. *See City of Richmonds v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Conner, J., concurring and dissenting). The remedy section of Title II of the ADA (42 U.S.C. § 12133) allows for this type of affirmative relief.

Just because the remedy section of the ADA allows for a separate cause of action against the public entity for not abiding by the ADA, does not mean that state courts cannot review, or no longer have an obligation to review the violation of the ADA within the context of a civil action. If anything, the remedy section of the ADA expands the avenues that are available to a plaintiff who is excluded from trial, by giving him or her the right to file a separate action for injunctive relief and damages, in addition to any review of federal law within the action by the state court. Implicit in the idea that a state court can be sued in a separate action for violation of the ADA is the notion that the state court must comply with the ADA, and that lack of compliance constitutes reversible error.

The ADA is a far-reaching federal statute that requires much more than for a public entity to make reasonable modifications to policies or practices. Although that is one aspect of the ADA, the ADA is a plenary statute designed to halt all practices that segregate or exclude persons with disabilities, and those that treat them inferior or differently.

It is to ensure that persons with disabilities are given the same basic guarantees of our federal constitution allowed to all citizens of this country. Petitioners made the trial court aware of this federal law, and the court chose to close its eyes to its existence. Petitioners are not asking this Court to enforce a collateral remedy provided by the remedy statute of the ADA. Petitioners are asserting that the trial court violated federal statutory equal protection by discriminating against a disabled party and removing his fundamental right to attend his own trial, a right provided to all non-disabled litigants. This Court has held that discrimination has no part in the courtroom. Such discrimination constitutes prejudicial error and mandates a new trial on the merits.

How ridiculous would it sound if this Court held as follows: "There is nothing in the Fourteenth Amendment that provides a basis for reversing the judgment of a lower court in a trial. Assuming the lower court's ruling constitutes a violation of the Fourteenth Amendment, the defendant must file a separate action in federal court to enjoin the lower court from violating the Fourteenth Amendment. Furthermore, such a violation would not constitute reversible error and is irrelevant to the outcome of the case."?

Respondents say nothing to refute petitioners' argument, as well as Chief Judge Bell's statements in his dissent, that the Maryland Court of Appeals sanctions a trial judge presuming prejudice based on a stereotypical assumption that sympathy equates with juror bias without a more critical examination of whether juror bias will actually result. The trial court undertook no action to factually establish whether the entire jury pool would be actually prejudiced and unable to render a fair and impartial verdict based on the law and facts presented. The trial court merely surmised, stereotypically and uncritically that the mere sight of Darwin would render the entire jury pool unable to set aside feelings of sympathy. The trial court also presumed without further analysis that any sympathy would automatically lead to bias

and impartiality on the part of jurors. The trial court should have implemented less restrictive measures such as pointed voir dire questions, strikes for cause, and cautionary instructions to weed out any potential juror prejudice. It was error for the trial court to fail to exhaust all other means of ensuring a fair trial before resorting to banning a party from the courtroom.

There is nothing factually in the record to support the court's unexamined presumption that Darwin Green's presence would result in any juror prejudice, let alone prejudice that could not be overcome by other means. Hence, this ruling does not conform to the strict scrutiny analysis the court must perform before denying a party his fundamental right to attend trial. Respondents simply ignore the fact that the simple answer to avoid any potential prejudice to the defendants in obtaining a fair and impartial jury is exclusion of a biased juror from the panel, not exclusion of the party from trial.

It is time for this Court to resolve the exclusion issue in a uniform manner that comports with constitutional law. Further percolation in the lower courts is not needed. Given the exceptional practical importance of this issue for the fair administration of justice for *all* parties, the recurring nature of the issue, and that the decision below is erroneous as a matter of federal constitutional and statutory law, this case is the perfect vehicle for resolving the conflict and once and for all solving the exclusion issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 2002